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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
MARINE POWER & EQUIPMENT COMPANY,)
INC., and STATE OF WASHINGTON,)
DEPARTMENT OF TRANSPORTATION,)

Appellants,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)

Respondent.)

PCHB Nos. 81-67 & 81-71

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$250 civil penalty for an emission allegedly in violation of respondent's opacity standard stated in Section 9.03(b) of Regulation I, came on for hearing before the Pollution Control Hearings Board convened at Seattle, Washington on September 28, 1981. William A. Harrison, Administrative Law Judge, presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant, Marine Power and Equipment Company, Inc., appeared by

1 its attorney, George S. Martin. Appellant State of Washington,
2 Department of Transportation appeared by Robert M. McIntosh, Assistant
3 Attorney General. Respondent Puget Sound Air Pollution Control Agency
4 appeared by its attorney, Keith D. McGoffin. Reporter Gene Barker
5 recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined.
7 Appellant's (Marine Power and Equipment Company, Inc.) motion at
8 hearing for continuance of the hearing was denied. The parties were
9 allowed, with their agreement, to submit affidavits containing the
10 statements which witnesses would have made at a continued hearing and
11 these affidavits were considered as evidence. The parties submitted
12 legal memoranda, the last of which was received November 23, 1981. A
13 proposed Final Findings of Fact, Conclusions of Law and Order was
14 issued on December 31, 1981. Exceptions were received. A transcript
15 of oral proceedings was prepared and members of the Board considered
16 the record herein. From testimony heard or read, exhibits examined,
17 exceptions and legal memoranda, the Pollution Control Hearings Board
18 makes these

19 FINDINGS OF FACT

20 I

21 Respondent, pursuant to RCW 43.21B.260, has filed with this Board
22 a certified copy of its Regulation I containing respondent's
23 regulations and amendments thereto of which official notice is taken.

24 II

25 On April 7, 1981, while on routine patrol, respondent's inspector
26

1 observed a blue-white emission from the boiler stack of a marine
2 vessel. The vessel was adjacent to a dock in the shipyard of Marine
3 Power and Equipment Company, Inc., (Marine Power) which is
4 constructing the vessel--a ferry--for the Washington State Department
5 of Transportation (WSDOT). A crew from Marine Power was operating the
6 boilers and caused the emission which aggregated at least 5-1/2
7 minutes in one hour and was of an opacity ranging from 30-60 percent.
8 Respondent assessed a civil penalty of \$250 against both Marine Power
9 and WSDOT for violation of Section 9.03(b) of Regulation I of
10 respondent. From this Marine Power and WSDOT appeal.

11 III

12 The emission in question was the result of engine testing by
13 Marine Power on April 7, 1981. Marine Power's official responsible
14 for notifying respondent of such tests testified that he did so on the
15 day of "initial startup of the engines." He could not independently
16 relate that date to the date in question. His written memorandum of
17 the notification had been lost. The only written record of the test
18 submitted into evidence, by Marine Power, specifies that both engines
19 were started "for the first time April 6 and April 7." (Emphasis
20 added.)

21 Respondent makes and retains written memoranda each time they are
22 notified of startups or other events listed in Section 9.16 of
23 Regulation I. Such notice begins a process that may vindicate a
24 person making such notice although they have caused emissions
25 exceeding normal standards. Respondent has no memorandum of any

1 notification from Marine Power relating to this vessel previous to or
2 on the date in question, April 7, 1981. Respondent has four memoranda
3 of notification from Marine Power relating to testing of this vessel
4 conducted on four dates following assessment of the civil penalty in
5 this instance.

6 We find that Marine Power did not immediately notify respondent of
7 the occurrence of engine testing (startup) on this vessel on April 7,
8 1981, which testing resulted in the emission found in Finding of Fact
9 I, above.

10 IV

11 Any Conclusion of Law which should be deemed a Finding of Fact is
12 hereby adopted as such.

13 From these Findings the Board enters these

14 CONCLUSIONS OF LAW

15 I

16 Respondent has cited Section 9.03(b) which states:

17 (b) After July 1, 1975, it shall be unlawful
18 for any person to cause or allow the emission of any
19 air contaminant for a period or periods aggregating
20 more than three (3) minutes in any one hour which is:

- 21 (1) Darker in shade than that designated
22 as No. 1 (20% density) on the Ringelmann Chart, as
23 published by the United States Bureau of Mines; or
24 (2) Of such opacity as to obscure an
25 observer's view to a degree equal to or greater than
26 does smoke described in Subsection 9.03(b) (1)...

27 II

At the close of respondent's case, both appellants moved for
dismissal of the order of violation and penalty. With regard to

1 Marine Power, respondent has established a prima facie case, and the
2 motion for dismissal is denied. With regard to WSDOT, respondent did
3 not establish a prima facie case that WSDOT caused or allowed the
4 emission as must be established to prove a violation of Section
5 9.03(b) which respondent cited. The motion for dismissal was granted
6 with regard to WSDOT and the penalty should be stricken as to it. As
7 used hereafter, the term "appellant" refers only to Marine Power.

8 III

9 We reject appellant's contention that respondent's inspector must
10 compare the Ringelmann Chart to an emission while observing it. The
11 Ringelmann Chart is merely a measure of darkness, Section 9.03(b)(1)
12 supra. Opacity which obscures an observer's view to the same degree
13 as that darkness (20% density) or greater is also prohibited.
14 Respondent proved an opacity of 20% or greater in excess of
15 permissible time limitations by the testimony of its qualified
16 observer, and thus proved that the emission in question violated the
17 standard of Section 9.03(b)(2).

18 IV

19 The limitation of Section 9.03(b) is that it shall be unlawful to
20 cause or allow certain opacity "aggregating more than three (3)
21 minutes in any one hour." PSAPCA's inspector began an observation of
22 this emission, noted excessive opacity for 5-1/2 of 17 continuous
23 minutes, and ceased the observation. From this PSAPCA contends that
24 the opacity aggregated more than 3 minutes in the hour commencing when
25 the inspector's observation commenced. Appellant, by contrast, urges
26 that the hour must commence in the exact middle of the 5-1/2 minutes

1 of excessive opacity which would leave 2-3/4 minutes in the prior hour
2 and 2-3/4 minutes in the following, each being short of a violation.
3 We conclude that the phrase "any one hour" in Section 9.03(b) supports
4 PSAPCA's interpretation and not the interpretation of appellant.

5 V

6 Appellant urges that Section 9.03(b) cited by PSAPCA does not
7 apply to the source in question, a ferry, because of Section 9.03(f)
8 which states:

9 This section shall not apply to motor vehicles or
10 aircraft.

11 "Motor vehicles" are defined at Section 1.07(aa) of Regulation I as:

12 Any operating vehicle or one capable of being
13 operated which has its own self-contained sources of
14 motive power, is designated for the transportation of
15 people or property, and is of the type for which a
16 license is required for operation on a highway.

17 Appellant contends that the ferry concerned here is a motor vehicle
18 within this definition. PSAPCA, which promulgated the rule and is
19 responsible for its implementation, contends to the contrary.

20 In interpreting this rule we give effect to the judicial rule of
21 statutory interpretation that the primary objective of such
22 interpretation is to carry out the legislative intent. Anderson v.
23 O'Brian 84 Wn.2d 64, 67, 524 P. 2d 390 (1974). When the above
24 definition of motor vehicles was adopted by PSAPCA, motor vehicle
25 licensing for operation on highways had been the subject of state
26 legislation for at least 37 years. Such licensing, under chapter
27 46.16 RCW, applies to "any vehicle" operating over and along "a public

1 highway of this state." RCW 46.10.010. We know of no instance where
2 such licensing, generally declared applicable to all vehicles on all
3 public highways, has been applied to state ferrys or other marine
4 vessels. When PSAPCA adopted its definition, Section 1.07(aa),
5 embracing the words "vehicle", "license" and "highway" these words
6 thus had a long standing meaning which excluded state ferrys and other
7 marine vessels. Section 9.03(b) therefore applies to the vessel in
8 question which is not exempt as a motor vehicle under Section
9 9.03(f).¹

10 Further substantiating this conclusion in RCW 70.94.435 of the
11 Clean Air Act which provides that to secure civil penalties such as
12 this one:

13 ...the state or authority shall have a lien on any
14 vessel used or operated in violation of this
chapter...(emphasis added).

15 Compare Section 3.29. From this we conclude that emissions from
16 marine vessels are subject to regulation under the Clean Air Act,
17 chapter 70.94 RCW. The State Department of Ecology (DOE) shall adopt
18 emission standards implementing the Clean Air Act. RCW
19 70.94.331(2)(b). At WAC 173-400-040(1), DOE has adopted an emission
20 standard which provides:

21
22 1. We also note that air pollution from motor vehicles is governed by
23 chapter 70.120 RCW. Therein, "motor vehicle" is defined as "any
24 self-propelled vehicle required to be licensed pursuant to chapter
25 46.16 RCW." RCW 70.120.010(4). Our interpretation of PSAPCA's
26 Section 9.03(f) therefore uses the same standard--chapter
27 46.16 RCW--to define what a motor vehicle is not as is elsewhere used
to define what a motor vehicle is, both within the context of air
pollution control law.

1 No person shall cause or permit the emission for
2 more than three minutes, in any one hour, of an air
3 contaminant from any source which at the emission
point, or within a reasonable distance of the
emission point, exceeds twenty percent opacity...

4 This DOE emission standard is substantially the same as PSAPCA's
5 Section 9.03(b)(2) and is applicable state wide to "all sources of air
6 contaminants except...(2) automobiles, trucks, trains, aircraft."
7 WAC 173-400-020. From this we conclude that DOE's emission standard
8 for opacity, WAC 173-400-040(1) above, applies to emissions from
9 marine vessels. Under RCW 70.94.380:

10 Every activated authority [PSAPCA] operating an air
11 pollution control program shall have requirements for
12 the control of emissions which are no less stringent
than those adopted by the department of ecology for
the geographic area in which such air pollution
program is located.

13 Less stringent emission standards may be approved by DOE only after
14 public hearing. RCW 70.94.380, and such has not been shown in this
15 case. Consequently, the interpretation of PSAPCA's opacity emission
16 standard, Section 9.03(b)(2) to exclude emissions from marine vessels
17 would render that local standard less stringent than that adopted by
18 DOE, and hence invalid. RCW 70.94.331(b) and 70.94.380. Moreover,
19 the DOE emission standard for opacity would apply to emissions from
20 marine vessels and would be enforceable by either DOE or PSAPCA. RCW
21 70.94.331(6). We conclude that PSAPCA's emission standard for
22 opacity, Section 9.03(b)(2), is no less stringent than that adopted by
23 DOE, WAC 173-400-040(1) and applies to emissions from marine vessels.
24 This is consistent with the Clean Air Act's stated purpose to provide
25

1 for a coordinated, state-wide program of air pollution prevention and
2 control. RCW 70.94.030.

3 VI

4 Appellant caused the emission in question and violated Section
5 9.03(b) of respondent's Regulation I.

6 VII

7 Appellant failed to notify PSAPCA of the emissions in question.
8 Appellant is not entitled to the exculpatory provision of Section 9.16
9 of Regulation I which is based upon such notice.

10 VIII

11 In summary, appellant violated Section 9.03(b) of Regulation I by
12 causing or allowing an emission of an opacity obscuring an observer's
13 view to a degree equal to or greater than does smoke designated as
14 No. 1 on the Ringelmann Chart for more than three (3) minutes in any
15 one hour. Appellant's emission is not exempted by the wording of
16 Section 9.03(f) relating to motor vehicles, and appellant failed to
17 give the notice which is required by Section 9.16. The violation and
18 civil penalty should be affirmed.

19 IX

20 Any Finding of Fact which should be deemed a Conclusion of Law is
21 hereby adopted as such.


22 From these Conclusions the Board enters this
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ORDER


The violation and \$250 civil penalty are affirmed as to Marine Power and Equipment Company, Inc., and reversed as to Washington State Department of Transportation.


DONE at Lacey, Washington this 3rd day of April, 1981.

POLLUTION CONTROL HEARINGS BOARD


NAT W. WASHINGTON, Chairman


GAYLE ROTHROCK, Vice Chairman


DAVID AKANA, Lawyer Member


WILLIAM A. HARRISON
Administrative Law Judge